Cempaka Finance Bhd v Willow Construction Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D6-22-822 OF 1998
REKHRAJ J
25 AUGUST 2000

***Contract** — Illegality — Unlicensed housing developer — Borrower not duly licensed developer under Housing Developers Act 1966 — Whether loan void for illegality — Whether defendants estopped from raising illegality — Whether defendants represented that licence was obtained by signing contract — National Land Code 1965 s 241(3)*

The plaintiffs granted to the first defendant a fixed loan facility in the sum of RM1.8m and a bridging loan of RM1.5m. The first defendant executed the loan agreement and the first legal charge over its properties, whilst the second, third, fourth and fifth defendants (the directors) executed their guarantee and indemnity payable upon demand for all moneys that shall be due and payable by the first defendant. Upon default by the first defendant, the plaintiffs applied for summary judgment against the defendants. The senior assistant registrar granted the application and the defendants appealed to the judge in chambers. The defendants argued that the plaintiff did not ensure that the first defendant was a duly licensed developer under the Housing Developers Act 1966. The licence was only issued on 13 January 1997, after the release of the whole loan amount. As the loan was given for a development which in law was prohibited without proper licensing, the loan agreement and all other securities secured thereby by the plaintiffs became void for illegality. The defendants argued the charge executed by the company also became void pursuant to s 241(3) of the National Land Code 1965. It was also argued that the second, third, fourth and fifth defendants had no knowledge as to when the facilities was utilized by the first defendant.

Held, dismissing the appeal:

(1) The borrower company had throughout been under the management and control of the second to fifth defendants, who were not only the directors but guarantors and indemnifiers for the total facility given by the plaintiffs to the first defendant company (see p 562H). The defendants had clearly by their calculated conduct in signing the facility agreement, not only represented to the plaintiffs that they had obtained the required licences for the purposes of development, but led the plaintiffs to a belief as to the truth, to their prejudice (see p 563C–D). With the representations of facts as made by the defendants and acted upon by the plaintiffs to their detriment, the defendants were estopped from renegating those facts to their own advantage (see p 563B). The issue of illegality thus was a non-starter and was thrown in only to cloud the issues (see p 563E).

(2) The second to fifth defendants were not only the guarantors cum indemnifiers, but also the directors of the first defendant company and their liability rested squarely within the corners of the facility agreement and their guarantees which they signed. Their arguments was made only to delay the plaintiffs to early judgment, especially in the face of the certificate of conclusive evidence clause which was binding on the guarantors as to their indebtedness (see pp 563H–564A).]

[Bahasa Malaysia summary

Plaintif-plaintif telah memberikan defendan pertama suatu kemudahan pinjaman tetap sebanyak RM1.8 juta dan pinjaman pembiayaan (bridging) sebanyak RM1.5 juta. Defendan pertama telah melaksanakan perjanjian pinjaman tersebut dan gadaian ke atas tanah-tanahnya, sementara defendan kedua, ketiga, keempat dan kelima (pengarah-pengarah tersebut) melaksanakan gerenti dan tanggung rugi mereka yang kena dibayar oleh defendan pertama. Di atas keingkaran defendan pertama, plaintif-plaintif telah memohon penghakiman terus terhadap defendan-defendan. Penolong kanan pendaftar telah membenarkan permohonan tersebut dan defendan-defendan telah merayu kepada hakim dalam kamar. Defendan-defendan telah berhujah bahawa plaintif tidak memastikan bahawa defendan pertama mempunyai lesen pemaju di bawah Akta Pemaju Perumahan 1966. Lesen hanya dikeluarkan pada 13 Januari 1997, selepas pengeluaran pinjaman penuh. Oleh kerana pinjaman telah diberikan untuk suatu pembangunan yang dilarang oleh undang-undang jika tanpa lesen yang wajar, perjanjian pinjaman dan semua jaminan lain yang dijamin oleh plaintif-plaintif adalah batal untuk kepenyalahan undang-undang. Defendan-defendan telah berhujah gadaian yang dilaksanakan oleh syarikat juga menjadi batal menurut s 241(3) Kanun Tanah Negara 1965. Juga dihujahkan bahawa defendan kedua, ketiga, keempat dan kelima tiada pengetahuan bila kemudahan-kemudahan tersebut telah digunakan oleh defendan pertama.

Diputuskan, menolak rayuan tersebut:

(1) Syarikat peminjam pada semua masa adalah di bawah pengurusan dan kawalan defendan-defendan kedua hingga kelima, yang bukan saja pengarah-pengarah tetapi juga penjamin-penjamin dan penanggung rugi untuk kemudahan penuh yang diberikan oleh plaintif-plaintif kepada syarikat defendan pertama (lihat ms 562H). Defendan-defendan telah melalui tindakan mereka di dalam menandatangani perjanjian pinjaman tersebut, bukan sahaja merepresentasikan kepada plaintif bahawa mereka telah memperoleh lesen yang diperlukan bagi tujuan pembangunan, tetapi telah membuatkan plaintif-plaintif percaya akan kebenaran tersebut, sehingga memprejudis mereka (lihat ms 563C–D).

Dengan representasi-representasi fakta yang dibuat oleh defendan-defendan dan ditindak oleh plaintif sehingga menjejaskan mereka, defendan diestop daripada menyatakan semula fakta-fakta tersebut untuk faedah mereka sendiri (lihat ms 563B). Isu mengenai kepenyalahan undang-undang adalah suatu permulaan yang salah dan hanya dimasukkan untuk mengaburkan isu-isu (lihat ms 563E).

(2) Defendan-defendan kedua hingga kelima bukan sahaja penjamin-penjamin dan juga penanggung rugi, tetapi juga pengarah-pengarah syarikat defendan pertama dan liabiliti mereka bergantung sepenuhnya kepada perjanjian kemudahan dan gerenti-gerenti yang mereka tandatangani. Hujahan-hujahan mereka hanya dibuat untuk melengahkan plaintif-plaintif untuk penghakiman lebih awal, terutamanya bila wujud fasal sijil keterangan konklusif yang mengikat penjamin-penjamin berkenaan dengan hutang mereka (lihat 563H–564A).]

Notes

For cases on illegality generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2394–2488.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Legislation referred to

Housing Developers (Control and Licensing) Act 1966
National Land Code 1965 s 241(3)
Rules of the High Court 1980 O 14

Watson Peters (*Watson Peters & Mohd Fuad*) for the plaintiffs/respondents.

Chandran Nair (*Thevin, Chandran & Wong*) for the first and second defendants.

K Nadarajah (*Rajehgopal & Silva Velu*) for the third, fourth and fifth defendants.

Rekhraj J: The plaintiffs granted to the first-named defendants a fixed loan facility in the sum of RM1.8m; and a bridging loan of RM1.5m by their letters of offers dated 23 November 1995, and 22 December 1995, respectively; and as amended by letter dated 26 January 1996; for the purposes as stated therein ('the letters of offer').

The letters of offer were accepted by the second, third, fourth and the fifth-named defendants; by their jointly and severally signing the acceptance as the directors of the first-named defendant company. One of the terms and conditions of the said letters was that the second to the fifth-named defendants were to provide their guarantee-cum-indemnity for all sums of moneys that shall be due and recoverable from the first-named defendant

as the borrower of the loan, and the said loan facility was in addition thereto to be secured by a first legal charge over the landed properties of the first-named defendant, and held under HS (D) 31196–31215; 31217–31233; 31236–31257 and 31260–31278 all in the Mukim and District of Klang, Selangor Darul Ehsan ('the charge'). A

In pursuance to the terms therein, the first-named defendant did execute the loan agreement and the first legal charge over its properties; whilst the second, third, fourth and fifth-named defendants ('the Directors'); executed their guarantee and indemnity payable upon demand *for all moneys* that shall be due and payable by the first-named defendant. (Emphasis added.) B

The loan agreement was for two types of facilities: C

(i) a fixed loan in the sum of RM1,800,000; and

(ii) a bridging loan in the sum of RM1,500,000;

and both these facilities were to be used by the first-named defendant to redeem the charged lands from Malayan Banking Bhd; and to part-finance in the development of the said lands under the first defendant's development project. D

The borrowers (the first-named defendants) through the hands of their directors by cl 2 of the loan agreement *represented, warranted and undertook*: E

(i) that the borrowers and/or the guarantors have the power or capacity to execute, deliver and perform the terms of the loan agreement ...;

(ii) that the agreement, the guarantee and the charge constitute or when executed will constitute the legally valid and binding obligations of the borrowers and/or the guarantors; F

(iii) that the execution, delivery and performance of this agreement ... *will not violate the provisions of any of the laws or regulations* ... of any government authority ...;

(iv) *that all consents, licences, approvals authorizations, order and exemptions of any ministry ... which are required on the part of the borrowers ... in connection with the business of the borrowers and/or the guarantors ... legality or enforceability ... have been obtained and are in full force and effect, and any conditions contained therein or otherwise applying thereto have been complied with.* G

The borrowers further by cl 2 warranted to the plaintiffs (as the lenders) that '*the representations and warranties* contained in the loan agreement *are true and accurate; and* that these warranties and representations *shall form the basis of the lender's commitments to make ... the loans to the borrower. If any of such representations and warranties were found to be untrue* or incorrect *then ... the lenders shall* have the right in their absolute discretion to ... *recall or terminate the loan*'. H I

By cl 5 of the loan agreement, the borrower also covenanted to pay the prescribed rate of interest and *to repay the said fixed loan and the bridging loan upon demand.*

By cl 30 it was accepted by the borrowers that a *statement* by the director ... or any *authorized officer* of the lender, showing the amount of such balance and ... the liabilities or due to the lender ... *shall be accepted by the borrower ... as final and conclusive evidence* for all purposes whatsoever including *for the purposes of legal proceedings.*

The second to fifth-named defendant ('the guarantors'), by their guarantee and indemnity letter dated 28 February 1996, covenanted:

(i) in consideration of the lender having agreed at the request of the borrower (note: the request was signed to; and accepted by the second to the fifth-named as directors; one of whom, the fifth-named, is a practising advocate and solicitor) and at the antecedent request of the guarantors, agreed to grant the loan facility to the borrower; the *guarantors unconditionally and irrevocably guaranteed* in their individual capacity to the effect *that if for any reason the borrower does not pay any sum payable by it* ... howsoever arising, *then the guarantors will pay on demand* ... that sum to the lender together with interest *by way of indemnity* arising from such default; and

(ii) that the said *guarantors shall be liable as* if they were the *sole principal debtor* and not merely as the surety ... nor shall their liability be affected by anything which would not discharge it ... including, *without limitation*:

(a) any obligation or purported obligation of the borrower under or *arising out of the loan facility* ... or become wholly or in part invalid or unenforceable against the borrower by reason of any ... breach *or want of authority ... or otherwise* or by reason of any legal limitation, disability, incapacity or any other fact or circumstances whether or not always *known to the lender*; and

(b) *to the illegality, invalidity or unenforceability* of or any defect in any provision of any of the security or this agreement or *any of the borrowers obligations* under the loan facility or the borrowers obligations under any of the security documents.

And lastly by section 6.01, of the guarantee and indemnity it was provided that *if the borrower shall make any default in the payment of any moneys due and payable* under the terms of the loan facility ... *the guarantors shall indemnify the lender* ... against all losses ... by reason of the default.

The plaintiffs have through their solicitors letters dated 3 March 1998, made a demand upon the defendants, only to default, thus resulting in the plaintiffs filing this action; and an application for summary judgment. The senior assistant registrar granted judgment under O 14 of the Rules of the High Court 1980 ('the RHC'). The defendants being dissatisfied have appealed to the judge in chambers.

The defendants in their affidavit in opposition to O 14 deposed:

(i) that both the loans were given by the plaintiffs to enable the first defendant to undertake a development project. The repayment of the loan sum was expected from the sale of the completed units. The

plaintiffs did not ensure that the first defendant was a duly licensed developer under the Housing Developers (Control and Licensing) Act 1966 ('the HDA') and having the licence to develop, which licence was only issued on 13 January 1997, after the release of the whole loan amount;

(ii) that as the loan agreement was executed in 1996, and the funds released soon after but in any event well before the issuance of a licence under the HDA to the first defendant, the loan agreement became void, as the loan was given for a development which in law was prohibited without proper licensing; and that the loan as released by the plaintiffs for development purposes was to an unlicensed developer; and therefore the loan agreement and all other securities secured thereby by the plaintiffs necessarily became void for illegality;

(iii) the plaintiffs having released the moneys on a void instrument therefore the transaction entered became illegal from its inception, and the plaintiffs' claim was now illegal and not enforceable under these proceedings; or any other proceedings that may be commenced by the plaintiffs against the defendants in the courts or elsewhere;

(iv) that the charges executed by the company too became void, as by s 241(3) of the National Land Code 1965, 'any charge taken which is in prohibition to any written law at the time of it being enforced' would make the charge on the secured titles void; because the first-named defendant did not at that particular time of creating the charge have developers licence to undertake the development, as required;

(v) that so long as the first-named defendant was an unlicensed developer, the loan made by the plaintiffs to the defendant for the express purpose of development became illegal and therefore void. Further deposing that the first-named defendant and the directors were then ignorant of the legal requirements and relied wholly upon the advise given by the plaintiffs with regard to the development under the HDA; and the plaintiffs being experienced financiers ought to have known the requirement of the law and acted accordingly to safeguard their own interest; and

(vi) that the loan was made contrary to the provisions of the HDA and thus it was illegal and void and the plaintiffs were consequently disentitled on grounds of illegality to prove a claim in this honourable court.

It is to be specifically noted that the borrower company had throughout been under the management and control of the second to the fifth-named defendants, who were not only the directors but guarantors and indemnifiers for the total facility given by the plaintiffs to the first-named defendant company, upon *their solemn representations, warranties and undertakings*. to the effect that both the borrowers and the guarantors had the power and the capacity to apply for and that their applications for the loan *will not in any way violate any of the provisions of the laws and regulations required of any government authority; and specifically further warranting to the*

lender that all such consents and or licences which may or be required on the part of the borrower for the purposes of their business including the legality or enforceability have been obtained and were in full force and effect; and any preconditions required, if any, have likewise been complied with.

With the representations of facts as made by the defendants herein and acted upon by the plaintiffs to their detriment; the defendants cannot now but are estopped from renegating those facts to their own advantage; as *justice and equity* both require that a party to an instrument making a representation of a fact which it knew not to be the truth; should be precluded from contradicting it to the prejudice of the other party, more when that other party had totally relied and acted thereupon or had been induced to alter its position, as a result thereof.

The defendants herein have clearly by their calculated conduct by their signing the facility agreement, not only represented to the plaintiffs, of their *having obtained the required licences for the purposes of development*, but led the plaintiffs to a belief as to the truth; to their prejudice; and the defendants therefore cannot now be heard to say in their defence contrary facts! That the plaintiffs ought to have known or otherwise that the developers licence was not available to the borrower when the loan was disbursed upon the request of the defendants.

The issue of illegality as raised by the defendants against the plaintiffs, is a non-starter and the court rejected that argument outright as a 'herring' thrown in only to cloud the issues. It is the duty of the judge under O 14 of the RHC, not to stop further deliberations as soon as a fact is asserted by one party and denied or disputed by the other in an affidavit; but to head on to sieve such assertions, denials or disputes to see whether they are equivocal, or lacking in precision or is *inconsistent with undisputed contemporary documents or other statements made by the same deponents*, or is inherently improbable in itself, *then the judge has a duty to reject such assertion or denial summarily; thereby rendering the issues not triable* (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400).

The defendants had in addition to illegality raised two other side issues viz-a-viz:

(a) the second, third, fourth and fifth-named defendants had no knowledge as to when the overdraft was utilized by the first-named defendant; and

(b) that the said defendants were given a promise by the plaintiffs that any legal action against the guarantors was only to be taken after the auction proceedings on the 89 individual titles (the charged lands).

As I said earlier, the second to fifth-named defendants were not only the guarantors cum indemnifiers; but also the directors of the first-named defendant company and their liability rested squarely within the corners of the facility agreement and their guarantees which they signed. Their argument thus lacked the very foundation to the truth and the court again summarily discounted it as 'concocted'; and lacking in precision, made only to delay the plaintiffs to early judgment, especially in the face of the

certificate of conclusive evidence clause which was binding on the guarantors as to their indebtedness.

I accordingly dismissed the appeal with costs of RM2,000.

Appeal dismissed.

Reported by Benjamin Yong